(2)

No. 04-1248

Supreme Court, U.S.
FILED
APR 15 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

VERNON BELLECOURT, *et al.*,

Petitioners,

v.

CITY OF CLEVELAND,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

TERESA M. BEASLEY
Director of Law

THOMAS J. KAISER*
Chief Trial Counsel

JOSEPH G. HAJJAR
Assistant Director of Law

CITY OF CLEVELAND, DEPARTMENT OF LAW
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
(216) 664-2800

Counsel for Respondent City of Cleveland

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Whether this Court should decline to review, on the grounds that it does not raise an important federal question, an Ohio Supreme Court decision that applied: (A) *Texas v. Johnson*, 491 U.S. 397 (1989), in recognizing that "[w]ithout question, the effigy burnings [are] constitutionally protected speech"; and (B) *United States v. O'Brien*, 391 U.S. 367 (1968), in holding that, under the specific factual record before it, the City of Cleveland had a sufficiently important governmental interest in public safety that was implicated when, on a "blustery day" outside a baseball stadium, Petitioners "doused a newspaper-stuffed effigy" with a can of highly flammable charcoal-lighter fluid, then "sprayed additional lighter fluid on the effigy" after it had already ignited, which caused the fire to "quickly accelerate[]" and to scatter burning remnants into a crowded area, where one large piece of burning debris landed on a person's foot.

Whether this Court should decline to review, on the grounds that it does not raise an important federal question, an Ohio Supreme Court decision that implicitly held, as a matter of state-law interpretation and based on the specific factual record before it, that an Ohio arson statute – making it illegal for any "person, by means of fire, . . . [to] [c]reate a substantial risk of serious physical harm to any person other than the offender" – could apply to a person: (A) who uses fire to endanger principally, but not exclusively, persons sympathetic to his protest; and (B) who does so in a crowd of protesters who are themselves partially, but not completely, segregated by barriers from other members of the public.

LIST OF PARTIES TO THE PROCEEDINGS

The Petitioners in this case are: Vernon Bellecourt, Juan Reyna, James Watson, Charlene Teters, and Zizwe Tchiguka.

The Respondent is the City of Cleveland.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	2
ARGUMENTS	10
I. This Court Should Deny The Writ Because The Decision Of The Ohio Supreme Court Turned On Factual Issues That Do Not Raise A Federal Question And That Petitioners Have Not Accurately Represented In Their Request For Review.	10
A. The Ohio Supreme Court Properly Stated And Properly Applied To The Facts Before It This Court's Rulings In *Texas v. Johnson* And *United States v. O'Brien*.	11
B. The Petitioners Have Not Accurately Represented The Factual Record Upon Which The Ohio Supreme Court Relied And Which They Distort In A Vain Attempt To Raise A Federal Question.	16
II. This Court Should Deny The Writ Because The Decision Of The Ohio Supreme Court Implicitly Turned On An Interpretation Of A State Arson Law And Therefore Does Not Raise A Federal Question	19
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES:

Bellecourt v. Cleveland, 104 Ohio St. 3d 439, 820 N.E.2d 309 (Ohio 2004) 22

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 14

Texas v. Johnson, 491 U.S. 397 (1989) ..... *passim*

United States v. O'Brien, 391 U.S. 367 (1968) ..... *passim*

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 14

STATUTES AND RULE:

42 U.S.C. § 1983 ..... 6, 7

Ohio Rev. Code § 2909.02 ..... 2, 8, 20

S. Ct. Rule 10 ..... 11, 22

MISCELLANEOUS:

Robert L. Stern, *Supreme Court Practice* 459 (8th ed. 2002) 11

INTRODUCTION

This case arises out of Respondent City of Cleveland's efforts to preserve public safety by arresting Petitioners Vernon Bellecourt, Juan Reyna, Zizwe Tchiguka, James Watson, and Charlene Teters who, when exercising their First Amendment right of expression, endangered a crowd of people by *unsafely* burning a nearly life-sized effigy.

Contrary to Petitioners' misleading formulation of the issue, this case is not about whether this Court's rulings prohibit the City of Cleveland from arresting "any speaker who burns an object in effigy, no matter how small or brief the fire, no matter how minor the threat to public safety." (Pet. i.) Indeed, the principal reason why this case raises no important federal question is because Petitioners are seeking review of a *factually specific* finding by the Ohio Supreme Court that nothing in *Texas v. Johnson* or *United States v. O'Brien* prevents police officers from arresting these particular Petitioners for their conduct in burning a nearly life-sized effigy on a blustery day, in a crowded area, by spraying additional accelerant on open flames and causing burning debris to scatter in the winds and fall on and near people. Because the Ohio Supreme Court recognized that "[w]ithout question, the effigy burnings were constitutionally protected speech" (Pet. App. 3) and generally agreed that "the right to free speech is hollow if it is exercised at the expense of arrest" (Pet. App. 3), and because Cleveland's police officers did not arrest other protesters who engaged in smaller scale and safer symbolic burnings that day (Tr. 389-90), Petitioners can fabricate a federal question involving effigy burning in general only by sanitizing, misrepresenting, and omitting almost all of the key material facts that persuaded the Ohio Supreme Court to find that Petitioners' particular conduct

in this specific case implicated an important governmental interest in public safety.

Moreover, Petitioners' second Question Presented also fails to raise an important federal question because it asks this Court to review the Ohio Supreme Court's implicit interpretation of a state law: Ohio's aggravated arson statute. That statute authorizes police officers to arrest any person who "by fire . . . [c]reates a substantial risk of serious physical harm to any person other than the offender." Ohio Rev. Code § 2909.02 (Pet. App. 31).

Petitioners have two problems with their argument that this Court should hear this case because they were "arrested under an aggravated arson statute that was not remotely applicable to the situation." (Pet. 9.) First, even if the Ohio Supreme Court's construction of the arson statute was erroneous – which it is not – this Court does not grant the Writ of Certiorari to review a state court of last resort's interpretation of whether a state law applied to a particular situation. And second, Petitioners' second Question Presented is predicated upon the same distortion of the factual record which, contrary to this Court's own guidelines, they are asking this Court to grant certiorari to review.

STATEMENT OF THE CASE

On April 9, 1998, the night before the opening game of the Cleveland Indians' baseball season, Petitioners prepared two nearly life-sized effigies to burn the next day at

Jacobs Field.[1] The effigies, one of the Cleveland Indians' team logo "Chief Wahoo" and the other of "Little Black Sambo," were stuffed with newspapers, covered by cloth, and were to be hung from wooden poles. To protest the Cleveland baseball team's use of the name "Cleveland Indians" and its team logo, Petitioners planned to burn the effigies following a march and demonstration that they had also organized. To effectuate their purpose, they made sure they had a can of charcoal-lighter fluid and some cigarette lighters, but did not think to bring a fire extinguisher or any receptacle to contain the flames or any burning debris. (Tr. 190-91, 227.)

On April 10, 1998, Petitioners and other protesters marched to Jacobs Field and gave speeches outside the stadium. Although Petitioners emphasize that this area was cordoned off with metal barricades to segregate the protesters from the baseball fans (Pet. 3, 8), a videotape of the event shows that the barricades were used solely to prevent pedestrians – fans as well as protesters – from entering into the path of motor vehicles. The barricades did not, in fact, succeed in isolating the protesters because in the vicinity where they planned to burn the effigies were civilian peacekeepers, other protesters not planning to participate in the burnings, members of the media, and some baseball fans, including children.

Following the marches and speeches, Petitioner Bellecourt soaked the first effigy with charcoal-lighter fluid. Commander David Regetz, the ranking police officer

---

[1] Jacobs Field has been the home of the Cleveland Indians baseball team since 1994.

at the scene, and Assistant Fire Chief Robert Schindler, who had thirty years of fire-fighting experience, warned the Petitioners that it was dangerous to light the effigies under the conditions present at the time. (Tr. 246, 289-90.) Ignoring these warnings, Petitioner Reyna held up the first effigy that Bellecourt had soaked with lighter fluid, while another protester (not a Petitioner) shielded the wind so that the effigy could catch fire. According to "The Local Climatological Data for Cleveland,"[2] the wind speed at around that time, i.e., just before game time, was 16 mph.

As soon as the first effigy caught on fire, Bellecourt sprayed more charcoal-lighter fluid on the already burning effigy to increase the intensity of the fire. (Tr. 225-26.) The fire then quickly accelerated and, within seconds, completely engulfed the effigy, causing it to disintegrate. Burning remnants of the effigy were swept up by the wind. At that point, Commander Regetz decided that the danger to public safety justified an arrest:

> It was the cumulative effect of the wind, the fact that people were walking in front along Ontario Street, some people actually cut through the demonstrations, and then when I saw the thing, the effigy burning and saw the distinct possibility that lit paper could be blowing around and could end up landing on somebody, that's what made my decision.

(Tr. 294.)

---

[2] The Local Climatological Data for Cleveland was introduced at trial as Defendants' Exhibit 5.

Like Commander Regetz, Assistant Fire Chief Schindler would also later testify that on that day, "it was windy enough [for the floating burning debris] to be a concern. . . ." (Tr. 249.) As the effigy was burning, "[he] was worried about one of the people passing by or possibly one of the protesters themselves getting hurt from this burning." (Tr. 259.) Schindler also explained why he thought this particular effigy burning was dangerous:

> It was not in something. It wasn't in a barrel or in a barbecue where it could be contained and pieces wouldn't be getting out and blowing around in the wind. There was some accelerant on it. . . . I was concerned about someone getting hurt from that. You don't know what people's clothes are made of. A piece of cloth or the paper in the effigy could blow against someone's clothes and if it's fuzzy enough it could catch on fire, or a little, small piece could catch them on the face and give them a burn welt.

(Tr. 259-60.)

Both Regetz and Schindler's concerns proved to be justified. After the effigy had disintegrated, the wind caused one of the burning remnants to land on Petitioner Reyna's left foot. Reyna did not notice the burning debris on his foot until after the Cleveland firefighters extinguished the flame. There were approximately six firefighters monitoring the protests, and between them they were able to retrieve two fire extinguishers that had been located in "little huts, little storage buildings" in the area. At the civil trial,[3] Reyna continued to deny the danger of

[3] Petitioners were never criminally prosecuted after they were arrested.

having come into direct contact with a sizeable, still-burning remnant, but Petitioner Watson, a Ph.D. with extensive experience in laboratory work, was more forthcoming. Dr. Watson admitted under oath that Bellecourt's actions were unsafe. In doing so, Watson further conceded that the can of charcoal-lighter fluid could have exploded, creating a "substantial risk of serious physical injury." (Tr. 225-26.)

After the first effigy was lit and then extinguished, the police officers at the scene arrested Bellecourt, Tchiguka, and Reyna. Shortly after, Petitioners Watson and Teters – who had witnessed the other three Petitioners get arrested (Tr. 231-32, 329) – nevertheless lit the second accelerant-soaked effigy and were also arrested. Tellingly, the police did not arrest other protesters at that same place and time who engaged in less dangerous symbolic burnings. Commander Regetz testified that after he arrested Petitioners, he saw other protesters holding "three-by-five cards" of Chief Wahoo and lighting the cards on fire, without using accelerants. Regetz chose not to arrest those protesters because "[he] didn't see a danger there." (Tr. 389-90.)

After their arrests, Petitioners were booked and jailed for aggravated arson and then released the next day. The City chose not to pursue the criminal charges.

On April 6, 2001, Petitioners' case against the City of Cleveland and the Cleveland Chief of Police Rocco Pollutro in his official capacity went to trial on Petitioners' Section 1983 claim for alleged violations of their First, Fourth and Fourteenth Amendment rights. Petitioners were unable to proceed against Commander Regetz because the statute of limitations had expired.

At the close of their case, the City and Chief Pollutro moved for a directed verdict. The municipal defendants argued that on the specific factual record of this case, no reasonable jury could find that Commander Regetz lacked probable cause to arrest Petitioners because of the threat they posed to public safety. The municipal defendants also argued that Petitioners had failed to meet their burden under Section 1983 to show the existence of a policy or custom that was the moving force behind the alleged constitutional violations. The trial court granted defendants' motion and directed a verdict in their favor.

On appeal, the Cuyahoga County Court of Appeals, reversed the trial court in a two-to-one decision handed down on May 15, 2003. (Pet. App. 12.) The court of appeals found that the City's asserted interest in protecting public safety was not implicated on the factual record before it (Pet. App. 20); therefore, the court need not consider whether, under *United States v. O'Brien*, "a sufficiently important governmental interest in regulating a non-speech element of conduct [justified] incidental limitations on First Amendment freedom." (Pet. App. 18.) The court also ruled that the trial court erred in directing a verdict in favor of the City on plaintiffs' Section 1983 claims. (Pet. App. 22.)

On July 10, 2003, the City filed its notice of appeal to the Supreme Court of Ohio. On December 15, 2004, in a five-to-two opinion, the Supreme Court of Ohio reversed the decision of the court of appeals. The Ohio Supreme Court recognized that, "[w]ithout question," under *Texas v. Johnson*, "the effigy burnings were constitutionally protected speech." (Pet. App. 3.) Moreover, the court "generally agree[d]" with the Petitioners' argument that "the right to free speech is hollow if it is exercised at the

expense of arrest." (Pet. App. 3.) The court ruled, however, that the "suppression of speech [in this particular case] was incidental to Cleveland's important interest in preventing harm caused by fire." (Pet. App. 3-4.) The court distinguished *Johnson* from the present case by stating that "[u]nlike *Johnson*, however, the *facts* here indicate that Cleveland's asserted interest in preserving public safety was implicated." (Pet. App. 5 (emphasis added).)

The majority opinion therefore implicitly rejected the reasoning of the two dissenting opinions, both of which had focused on the proper construction of Ohio Rev. Code § 2909.02, Ohio's aggravated arson statute. That statute provides in relevant part:

> (A) No person, by means of fire or explosion, shall knowingly do any of the following:
>
> (1) Create a substantial risk of serious physical harm to any person *other than the offender*.

Ohio Rev. Code § 2909.02 (Pet. App. 31) (emphasis added). The gravamen of both dissenting opinions is that, on this record, "[e]ven though one might be concerned with the potential danger of burning effigies, there is no evidence that anyone *other than the protesters* [*themselves*] were placed in any risk of serious physical harm resulting from appellees' conduct." (Pet. App. 9 (Moyer, C.J., dissenting) (emphasis added); *see also* Pet. App. 10 (Pfeiffer, J., dissenting) ("the record shows that burning pieces of the effigy landed near the protesters themselves, *not anyone else.*") (emphasis added).)

On this matter of state-law interpretation, however, the Ohio Supreme Court's majority opinion refused to take such a crabbed view of who qualifies to be protected from substantial risk of physical harm:

> Though appellees emphasize that they set the fire in a cordoned area devoid of flammable property, the police were obligated to protect *the public, including the protestors themselves.* A video of the effigy burnings and arrests is part of our record. It shows a protestor spraying accelerant on a burning effigy and then retreating from the rapidly growing fire before burning pieces of the disintegrating effigy began floating in the wind and landing in the proximity of the protestors. These facts implicate Cleveland's asserted interest in public safety.

(Pet. App. 5 (emphasis added).)

After determining that a governmental interest was implicated on the *facts* before it, the Ohio Supreme Court applied the first three of the four-pronged intermediate scrutiny test that this Court defined in *United States v. O'Brien*, 391 U.S. 367 (1968):

> The parties do not dispute, nor do we question, that safety regulations are within Cleveland's constitutional powers or that such regulation furthers an important or substantial government interest that is generally unrelated to the suppression of free expression. Therefore, the first three prongs of *O'Brien's* test are satisfied.

(Pet. App. 5-6.) Turning to the fourth prong, the Ohio Supreme Court held:

> *Under the facts before us*, we determine that the arrests were narrowly tailored to Cleveland's asserted interest in preserving public safety. Therefore, the fourth prong of *O'Brien's* test is satisfied, and any incidental limitation on appellees' First Amendment freedoms was justified.

(Pet. App. 7 (emphasis added).)

Since the Ohio Supreme Court's opinion faithfully applied this Court's rulings in *Johnson* and *O'Brien*, and turned on the court's specific findings of fact as well as its interpretation of Ohio's aggravated arson statute, this case raises no substantial federal question, and this Court should therefore deny Petitioners' request for review.

ARGUMENTS

I. This Court Should Deny The Writ Because The Decision Of The Ohio Supreme Court Turned On Factual Issues That Do Not Raise A Federal Question And That Petitioners Have Not Accurately Represented In Their Request For Review.

Although Petitioners do their best to couch their argument in terms of an important federal question, their efforts are unavailing. What Petitioners' complaint boils down to is that they disagree with the Ohio Supreme Court's findings of fact, findings that were based on evidence so overwhelmingly in the Respondent's favor that the trial court in this case entered a directed verdict for the City of Cleveland. Recognizing that Petitioners had a First Amendment right to use effigy burning as a means to express their views, the Ohio Supreme Court nevertheless held that the dangerous manner in which they did so on April 10, 1998, implicated a sufficiently important governmental interest in public safety to justify incidental restrictions on speech. Only by omitting, distorting, and misrepresenting what happened that day can Petitioners try to persuade this Court that anything the Ohio Supreme Court said or did creates a federal question. And unfortunately for Petitioners, even if the Ohio Supreme

Court somehow got the facts wrong – which it did not do – this Court's Rule 10 would still block their path to the Courthouse door: "[C]ertiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10; *see also* Robert L. Stern, *Supreme Court Practice* 459 (8th ed. 2002) ("[t]he Court is too busy to supervise every application of its precedents to particular facts and circumstances, even if a given application is arguably wrong.")

A. The Ohio Supreme Court Properly Stated And Properly Applied To The Facts Before It This Court's Rulings In *Texas v. Johnson* And *United States v. O'Brien.*

Although Petitioners, sounding a lot like Chicken Little, allege that the Ohio Supreme Court's opinion "created a fire safety exception to *Texas v. Johnson* so easy to invoke that it effectively overrules that decision" (Pet. 8), while also "us[ing] *O'Brien* to set up an invincible fire safety justification so easy for the State to invoke that it can be used to punish virtually every instance of flag burning and effigy burning" (Pet. 8), the truth is that the sky is *not* falling, because the Ohio Supreme Court correctly applied both *Johnson* and *O'Brien* to the factual record before it.

The opinion began by affirming that "[w]ithout question, the effigy burnings were constitutionally protected speech. See *Texas v. Johnson*." (Pet. App. 3 (full citation omitted).) The court also stated that it "generally agree[d]" with Petitioners' argument "that the right to free speech is hollow if it is exercised at the expense of arrest." (Pet. App. 3.) Having affirmed and applied – rather than overruled,

as Petitioners contend – this Court's decision in *Johnson*, the opinion next turned to *United States v. O'Brien*: "When speech and nonspeech elements are part of the same course of conduct, 'a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.' *United States v. O'Brien.*" (Pet. App. 4 (full citation omitted).) After quoting the four criteria that the *O'Brien* Court established for determining whether a state regulation is justified, the Ohio Supreme Court then stated the precise question raised by the case before it:

> The threshold issue to *O'Brien's* test is whether a governmental interest asserted by Cleveland is implicated on the facts before us. See *Texas v. Johnson*. If the city has not asserted a pertinent interest, then we cannot apply *O'Brien's* test, and the city has failed to justify its infringement upon appellees' right to free speech.

(Pet. App. 4 (full citations omitted).)

The Ohio Supreme Court then distinguished *Johnson* even as it acknowledged its factual similarities to this case: "As in *Johnson*, the conduct in question here involved expression via the burning of a symbol." (Pet. App. 5). But "[u]nlike *Johnson*, however, the facts here indicate that Cleveland's asserted interest in preserving public safety [as opposed to Texas' asserted interest in avoiding a possible breach of public order] was implicated." (Pet. App. 5.) The Ohio Supreme Court based that finding in part on the testimony of the police officers on the scene: "In the judgment of Cleveland's police officers, the windy conditions coupled with the spraying of additional accelerant on the already burning effigies created a hazard, which was their responsibility to remedy." (Pet. App. 5.) But the

justices did not rely exclusively on their testimony, which directly contradicts Petitioners' assertion that the court "[u]ltimately . . . fully justified [these arrests] under *O'Brien* 'because of a perceived public safety threat' *by the police*." (Pet. 7 (*quoting* Pet. App. 7) (emphasis added); *see also* Pet. at 8-9 ("Under the Opinion police are free to arrest and jail anyone who burns a flag or an effigy, so long as they 'perceive' the requisite 'threat' to public safety") (*quoting* Pet. App. 7).) On the contrary, the Ohio Supreme Court *independently* reviewed the specific factual record before it and reached its own conclusions about the extent of the danger to public safety:

> A video of the effigy burnings and arrests is part of our record. It shows a protestor spraying accelerant on a burning effigy and then retreating from the rapidly growing fire before burning pieces of the disintegrating effigy began floating in the wind and landing in the proximity of the protestors. *These facts* implicate Cleveland's asserted interest in public safety.

(Pet. App. 5 (emphasis added).) Thus, the justices used their own eyes – and not merely the perceptions of the police – in finding on these facts that the effigy burnings that day were sufficiently dangerous to implicate the City's interest in preserving public safety.

Because the Ohio Supreme Court so clearly premised its holding on the fire threat to public safety, this Court should not be taken in by Petitioners' misrepresentation that what is at stake here is "the state's interest in maintaining order." (Pet. 10 ("[F]ree speech rights are not so easily trumped (*as they were here*) by the 'state's interest in maintaining order.'") (emphasis added).) The Ohio Supreme Court's only reference to "maintaining order" was

when it paraphrased the holding in *Johnson*: "In sum, Johnson was arrested for exercising a constitutional right, not for conduct that threatened the state's interest in maintaining order." (Pet. App. 5.) In other words, the threat to public order was what was at stake in *Johnson* and every time the Ohio Supreme Court referred to the intent at stake here, it always spoke in terms of preserving "public safety" and never once "public order."

Once it determined that a governmental interest in preserving public safety was implicated, the Ohio Supreme Court applied the four-prong *O'Brien* test to determine if the City's infringement on Petitioners' right to free speech was justified: "The parties do not dispute, nor do we question, that safety regulations are within Cleveland's constitutional powers or that such regulation furthers an important or substantial government interest that is generally unrelated to the suppression of free expression. Therefore, the first three prongs of *O'Brien's* test are satisfied." (Pet. App. 5-6.) In turning to the fourth prong – whether the incidental restriction on free expression is no greater than necessary to further the City's interest in preserving public safety – the court properly refused to apply strict scrutiny: "[O]ur analysis is based on *O'Brien's* relatively lenient standard that 'is little, if any, different from the standard applied to time, place, or manner restrictions.'" (Pet. App. 6 (*quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)).) The court also recognized that the City's actions had to be "narrowly tailored to serve the government's legitimate, content-neutral interests" (Pet. App. 7 (*quoting Ward v. Rock Against Racism*, 491 U.S. 781 (1989))), but need not be "the least restrictive . . . means"

of doing so, as the following quotation from *Ward* makes abundantly clear:

> [W]e reaffirm today that a regulation of the time, place, or manner of protected speech . . . need not be the least restrictive or least intrusive means of doing so. . . . [T]he regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Ward, 491 U.S. at 798-800, *quoted in* Pet. App. at 7. The court then rejected the Petitioners' arguments – repeated here – that the court should impose a duty to warn and to require a less restrictive alternative than arrest, a rejection that was carefully grounded in the factual record:

> [A]ppellees' argument presumes that warnings would have obviated a fire hazard or that they were arrested merely for burning effigies. To be certain, the police knew that protestors intended to burn effigies. There is no indication, however, that the police had prior knowledge of the dangerous manner in which the effigies were to be burned, and it would be utterly impractical to require police to be so prescient as to issue appropriate warnings. Moreover, the record demonstrates that Cleveland arrested appellees not because they burned effigies, but because of a perceived public safety threat in the manner in which they burned the effigies.

(Pet. App. 7.) "*Under the facts* before us" the Ohio Supreme Court concluded "that the arrests were narrowly tailored to Cleveland's asserted interest in preserving public safety." (Pet. App.7 (emphasis added).)

B. The Petitioners Have Not Accurately Represented The Factual Record Upon Which The Ohio Supreme Court Relied And Which They Distort In A Vain Attempt To Raise A Federal Question.

Petitioners know full well that this Court would never grant certiorari if they claimed merely that the decision of the Ohio Supreme Court was based on erroneous factual findings. Therefore, they strain to present this Court with a much tamer version of the manner with which they conducted their burnings and then ask this Court, based on *that* version of the facts, to conclude that "[i]f a substantial threat to fire safety may be found *on this record*, then it will be present every time a flag or effigy is burned." (Pet. 8 (italics in the original).)

Perhaps the most glaring omission of Petitioners' brief is their failure to disclose that the "meager little fires" (Pet. 8) that they refer to in their petition actually involved the spraying of accelerant on already-burning, nearly life-sized effigies that had already been soaked in lighter fluid. Additionally, Petitioners fail to mention the 16 mph winds that were gusting at the time of the burnings, even though this fact so impressed the Ohio Supreme Court that the first line of its opinion reads as follows: "April 10, 1998, opening day for the Cleveland Indians baseball team, was a blustery day in downtown Cleveland." (Pet. App. 1.) Moreover, while Petitioners claim that the "danger 'highlight' " of the burnings was a "fragment of burning material float[ing] to the ground near one of the protesters" (Pet. 8), the Ohio Supreme Court, which watched the video of the burnings, describes a scene where a protester was "retreating from the rapidly growing fire before burning pieces of the disintegrating effigy began

floating in the wind . . . " (Pet. App. 5), and a closer look at the video shows a sizeable piece of burning debris landing on top of Petitioner Reyna's left foot. Similarly, Petitioners seek to minimize the number of people threatened by the burning fragments by claiming that the public was separated from their protest by metal barricades; but Commander Regetz testified that those barriers, which were erected for a different purpose, did not actually succeed in fully segregating the protesters, and played a role in his decision to effect an arrest:

> It was the cumulative effect of the wind, the fact that people were walking in front along Ontario Street, some people actually cut through the demonstrations, and then when I saw the thing, the effigy burning and saw the distinct possibility that lit paper could be blowing around and could end up landing on somebody, that's what made my decision.

(Tr. 294.) And finally, Petitioners' assertion that "[o]ther than the effigies, there were no flammable objects in the area" (Pet. 8) conveniently omits the fact that another extremely combustible object – a can of charcoal-lighter fluid – was itself not only in the area, but placed by Petitioners in dangerously close proximity to the burning effigies.

It is with these facts in mind – and not the sanitized and inaccurate version in the Petition for Certiorari – that the Ohio Supreme Court found the *manner* with which these Petitioners engaged in the burnings to implicate the City's interest in public safety. Indeed, one of the Petitioners himself conceded on the stand that the situation that day created "a substantial risk of serious physical injury." (Tr. 225-26.) Contrary to Petitioners' assertions, therefore,

the issue presented in this case is not whether *any* effigy burnings – "no matter how small or brief the fire, no matter how minor the threat to public safety" (Pet. i) – implicate a governmental interest; rather, the issue is whether *these particular* effigy burnings do so, which makes it all the more incumbent on counsel to present this Court with an accurate and complete representation of the factual record.

Moreover, another part of Petitioners' legal argument is predicated on an incomplete or distorted characterization of the facts. Petitioners argued before the Ohio Supreme Court – as they do now – that Cleveland police officers had a duty to warn them that they might face arrest. Even if that were so – which the Ohio Supreme Court held that it was not – there is sworn testimony in the record that the City police did in fact warn them. Both Commander Regetz and Assistant Chief Schindler testified that they warned Petitioners about burning an effigy under the conditions present at the time. (Tr. 246, 289-90.) Petitioners ignored the warnings, burned the effigies, and even sprayed accelerant on the open flames; and when they did so, they were arrested.

Thus, despite Petitioners' efforts to sanitize and trivialize the danger posed by their actions, the facts in this case reveal that Petitioners engaged in conduct that jeopardized public safety. And it is their specific conduct – and not some hidden animus against effigy burnings in general – that led the Ohio Supreme Court to conclude that the City police officers were serving an important interest in preserving public safety when they arrested the Petitioners. After all, Commander did not arrest other protesters at the scene who lit on fire "three-by-five cards" of Chief Wahoo because "[he] didn't see a danger there."

(Tr. 389-90.) Because the Ohio Supreme Court correctly applied to the factual record before it this Court's well-settled principles in cases involving both speech and conduct, this litigation does not raise a federal question and this Court should deny the Writ.

II. This Court Should Deny The Writ Because The Decision Of The Ohio Supreme Court Implicitly Turned On An Interpretation Of A State Arson Law And Therefore Does Not Raise A Federal Question.

In their attempt to persuade this Court that the Ohio Supreme Court is actually opposed to all effigy burnings – "no matter how small or brief the fire, no matter how minor the threat to public safety" (Pet. i) – the Petitioners even go so far as to accuse the Ohio court of purposely misapplying the state's arson law and encouraging other judges to do so: "Under the Opinion, maintaining public order is so important that judges must defer even to the arrest of protesters under statutes that *do not apply* to their conduct." (Pet. 11 (italics in the original); *see also* Pet. 9 (Petitioners "were arrested under an aggravated arson statute that was not remotely applicable to the situation").) Putting aside, once again, that the Ohio Supreme Court never used the term "public order" and only referred to "maintaining order" when paraphrasing the facts in *Texas v. Johnson*, Petitioners' argument here proves too much: If this case is really about how to apply Ohio's arson law – and it is at least in part about that – then there is no federal question for this Court to review.

Certainly the two dissenting justices on the Ohio Supreme Court, whose opinions are quoted by the Petitioners, thought that this case turned on the proper

interpretation of Ohio's aggravated arson statute. If they thought instead, as Petitioners argue, that the majority opinion "effectively overrules" (Pet. 8) – or even misinterprets – *Texas v. Johnson*, then surely they would have mentioned (or cited to) that decision in their dissents. In truth, however, neither dissenter does so, and only one of them even cites to *United States v. O'Brien*. In telling contrast, however, both dissenting justices begin their opinions by quoting Ohio's arson statute which states in relevant part:

> (A) No person, by means of fire or explosion, shall knowingly do any of the following:
>
> (1) Create a substantial risk of serious physical harm to any person other than the offender.

Ohio Rev. Code § 2902.02 (Pet. App. 31), *quoted in* Pet. App. 8 (Moyer, C.J., dissenting); Pet. App. 10 (Pfeiffer, J., dissenting).

The gravamen of both dissenting opinions is that, on this record, "[e]ven though one might be concerned with the potential danger of burning effigies, there is no evidence that anyone *other than the protesters* [*themselves*] were placed in any risk of serious physical harm resulting from the appellees' conduct." (Pet. App. 9 (Moyer, C.J., dissenting) (emphasis added); *see also* Pet. App. 10 (Pfeiffer, J., dissenting) ("the record shows that burning pieces of the effigy landed near the protesters themselves, *not anyone else*") (emphasis added).)

On this matter of state law interpretation, however, the Ohio Supreme Court's majority opinion refused to take such a crabbed view of who qualifies to be protected from substantial risk of physical harm:

> Though appellees emphasize that they set the fire in a cordoned area devoid of flammable property, the police were obligated to protect *the public, including the protestors themselves*. A video of the effigy burnings and arrests is part of our record. It shows a protestor spraying accelerant on a burning effigy and then retreating from the rapidly growing fire before burning pieces of the disintegrating effigy began floating in the wind and landing in the proximity of the protestors. These facts implicate Cleveland's asserted interest in public safety.

(Pet. App. 5 (emphasis added).)

Moreover, there were other facts in the record which support the majority's concern for "the public['s]" safety, and not just the safety of the few Petitioners directly involved in the effigy burnings. For example, in the vicinity of the burning remnants were civilian "peacekeepers," members of the media, City police and fire personnel, protesters who did not participate in the burnings, and some baseball fans cutting through the demonstrations, including children.

Thus, what primarily caused the five justices in the majority to disagree with the two in dissent is another factual dispute about whether the only persons endangered by the effigy burnings that day were the ones exempted by Ohio's arson law, i.e., those who knowingly created a substantial risk of serious physical harm *only to themselves*. And that factual dispute is itself inextricably connected to the one between Petitioners and the Ohio Supreme Court about whether their actions that day implicated the City's interest in preserving public safety.

The Respondent respectfully submits that the Ohio Supreme Court correctly resolved both those factual

issues, but even if it did not do so, the petition for certiorari does not lie to correct a state supreme court's misapplication of either a state statute or "of a properly stated rule of law." S. Ct. Rule 10.

CONCLUSION

Since the Ohio Supreme Court's opinion in *Bellecourt v. Cleveland*, 104 Ohio St. 3d 439, 820 N.E.2d 309 (Ohio 2004) faithfully applied this Court's rulings in *Texas v. Johnson* and *United States v. O'Brien*, and turned on the court's specific findings of fact as well as its interpretation of Ohio's arson statute, this case raises no substantial federal question, and this Court should therefore deny Petitioners' request for review.

Dated: April 15, 2005.

Respectfully submitted,

TERESA M. BEASLEY
Director of Law

THOMAS J. KAISER*
Chief Trial Counsel

JOSEPH G. HAJJAR
Assistant Director of Law

CITY OF CLEVELAND,
DEPARTMENT OF LAW
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
(216) 664-2800

Counsel for Respondent
City of Cleveland

**Counsel of Record*